REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-REV-2021/00315

In the matter between

PEDRO LOUISE VEIRA **APPLICANT**

and

PROSECUTOR-GENERAL **1ST RESPONDENT**
ATTORNEY GENERAL **2ND RESPONDENT**
MINISTER OF JUSTICE **3RD RESPONDENT**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA **4TH RESPONDENT**

Neutral citation: *Veira v Prosecutor General and Others* (HC-MD-CIV-MOT-REV-2021-00315) [2022] NAHCMD 659 (6 December 2022)

Coram: Shivute J, January J et Claasen J
Heard: **28 June 2022**
Delivered: **6 December 2022**

Flynote: Constitutional law – Legislation – Combatting of Rape Act 8 of 2000 –

Constitutionality of definition of ‘coercive circumstances’ in section 2(2) of the Combatting of Rape Act 8 of 2000 insofar as it contains the words ‘but is not limited to’ – Provision designedly broad – Expansion of coercive circumstances necessary to catch the diverse permutations of fact wherein the offence can manifest – Wide variety of manipulative tactics that a perpetrator may utilize to intimidate and force a complainant into submission – Impossible for the legislature to exhaustively list all the permutations of coercive circumstances in advance.

Legislation – Combatting of Rape Act 8 of 2000 – Challenge to section 2(2)*(c)* – Deals with specific form of coercive circumstances – Threats to cause harm, other than bodily harm, to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats – Applicant not charged with rape of coercive circumstances under relevant provision and he has not persuaded the court that he is aggrieved or a person under threat of a conviction under that provision.

Summary: The applicant is currently facing several charges under the Combatting of Rape Act 8 of 2000 (CORA) in the Windhoek Regional Court. His application before this court attacks the constitutionality of certain provisions of the CORA, more specifically, the definition of ‘coercive circumstances’ in s 2(2) insofar as it contains the words ‘but is not limited to’ and s 2(2)(*c*) which pertains to threats to cause harm, other than bodily harm made to a complainant or a person other than the complainant.

Held the phrase ‘but is not limited to’ in s 2(2) of CORA is designedly broad. The expansion of coercive circumstances was necessary to cover the wide extent of the coercive circumstances and alike situations.

Held further that the phrase ‘but is not limited to’ serves a legitimate purpose of dealing with grave societal mischiefs, namely the scourge of rape cases and perpetrators to evade punishment under the cloak of the law.

Held further that a perpetrator may utilize a wide variety of manipulative tactics to intimidate and force a complainant into submission, which makes it impossible for the legislature to list each and every form of coercive circumstances in advance.

Held further that coercive circumstances alone do not constitute the offence of rape, as other elements are also required such as intention and the commission of a sexual act.

Held further that the provision is not vague as the word ‘coercive’ is steeped in connotations of intimidating behaviour in one or other form and the absence of free will.

Held further that in accordance with the requirements of a charge, the particulars of the coercive circumstances will have to be specified in the charge, which in turn serves to inform an accused what particular behaviour constitutes the ‘coercive circumstances’.

Held further that the procedure to inform an accused of the reason(s) for his or her arrest, is now firmly entrenched in our law in terms of Article 11(2) of the Constitution and the authorities cannot deviate from that.

Held further that the applicant has been informed of the particulars of the charges which include the specified alleged forms of coercive circumstances as well as the evidence in possession of the State. Armed with all that information, he has been placed in a position to properly prepare for trial and present a defence.

Held further that the phrase ‘but is not limited to’ in s 2(2) has not impeded on the applicant’s right to have adequate facilities for the preparation of his trial. Therefore the phrase ‘but is not limited to’ in s 2(2) is not vague and the applicant knows what behavior he has to answer for.

Held further that the applicant was not charged with any provision under section 2(2)*(c)* and he has not persuaded the court that he is aggrieved or a person under threat of a conviction under that provision.

ORDER

1. The application is dismissed.
2. There shall be no order as to costs.

JUDGMENT

CLAASEN J (SHIVUTE J and JANUARY J concurring).

Introduction

[1] This application concerns the constitutionality of a segment in the definitions clause of rape as defined in the Combatting of Rape Act 8 of 2000 (CORA or the CORA). The first attack is aimed at the definition of 'coercive circumstances' in s 2(2) of the CORA insofar as it contains the words 'but is not limited to' and in the second instance the applicant targets s 2(2)*(c)* of the CORA which pertains to threats, made to a complainant or a person other than a complainant.

[2] The respondents opposed the application, with only the Prosecutor-General filing an answering affidavit. The applicant, after having been put on terms by the court, belatedly, filed a replying affidavit. Though the applicant filed a notice of motion for condonation purposes, it had no supporting affidavit. Having heard the parties on the issue, it became abundantly clear that there was no proper condonation application to consider and the main matter was heard without the replying affidavit.

[3] The applicant sought declaratory orders that may be summarized as follows:

(a) Declaring that insofar as the first respondent based her decision to charge the applicant on a portion of s 2(2) of the CORA which contains the words 'but is not limited to,' that such decision was unlawful and of no force of law and thus setting aside that decision;

(b) Declaring that a portion of s 2(2) of the CORA which contains the words 'but is not limited to' is unconstitutional and striking that portion from the rest of s 2(2) of the CORA;

(c) Declaring that ss 2(2)*(c)* of the CORA is unconstitutional for unduly placing an unreasonable limitation to the applicant's rights contemplated in Article 12 of the Namibian Constitution; and

(d) Declaring that ss 2(2)*(c)* of the CORA is unconstitutional and striking a portion of s 2(2)(c) of the CORA from the rest of s 2(2) of the CORA.

Background

[4] The applicant is a Cuban national who is employed in Namibia. He currently faces charges[1] in the Regional Court sitting at Windhoek, which include charges under the CORA. At the stage of being asked to plead to the charges, the applicant's counsel informed the regional court magistrate of the intention to bring a constitutional challenge. On that basis the case was postponed pending the outcome of this application and the appellant's bail was extended on certain specified conditions.

[5] The applicant in his founding affidavit inter alia states that s (2)(2) of the CORA purports to give a definition for 'coercive circumstances, but it leaves open the description of further coercive circumstances that are subject to the whim of anyone. That, he contends, renders the provision vague and it permits the prosecution to seek a conviction on undisclosed conduct or unclear conduct. He avers that he finds himself in a situation of facing criminal behavior that supports limitless charges that contains limitless conduct that has not been properly set out by the legislature.

[6] The applicant contends that the impugned provision violates his ability to adequately prepare for trial as guaranteed in Article 12(1)*(e)* of the Namibian Constitution. He deposes that because the list is open ended, he does not know what other coercive circumstances may be taken into consideration and he may end up being

[1] Case no. CRM-WHK-30697/2018.

convicted for other coercive circumstances. In that vein, he would be unable to prepare himself for trial. Consequently, he states that he is also unable to receive proper legal assistance as he was advised that his legal practitioners are unable to fully account for the extent to which the State or the court will stretch the factors pertaining to coercive circumstances.

[7] As far as the challenge in respect of s 2(2)*(c)* of CORA is concerned, he avers that a threat to do non-bodily harm is just too wide and it is not clear how the conduct referred to in s 2(2)*(c)* has to manifest itself. He contends that he was advised that the manner in which the provision is framed does not make it a requirement that the threats must be unlawful and that he fears that even 'lawful threats' could be perceived criminalized coercive circumstances. He deposed that on the advice of his legal practitioners, it is common in Namibian divorce law that spouses are ordered by the High Court through restoration of conjugal rights orders to restore conjugal rights or else 'some lawful non-bodily harm' will almost ensue.

[8] The Prosecutor-General, in the answering affidavit, states that s 2(2) of CORA sets out what coercive circumstances encompass and makes it clear that the list is not exhaustive. She states that coercive circumstances includes force, threats of force and other situations which enables a person to take unfair advantage of another through the exercise of power which points to the absence of free will on the part of the complainant. She also avers that the procedural law contains sufficient safeguards in the event that a person is aggrieved by a charge.

[9] She denies the assertion that a person who is charged under that provision would be unclear about the extent of the criminal behaviour as the prosecution is required by law to inform an accused of the particulars of the charge. On the advice of a prosecutor, a certain Ms Nangoro, that is indeed what occurred in the applicant's case. In respect of count 1 the alleged coercive circumstances were the application of force, threatening by word or conduct to apply physical force to the complainant, to wit: he will strangle her and throw her through the window, threatening to stab the complainant,

detention of the complainant in her room and that the complainant was affected by a physical disability or helplessness, mental incapacity or other inability. As far as count 2 was concerned, the alleged coercive circumstances were the application of physical force, threatening by word or conduct to apply physical force against the complainant, unlawful detention of the complainant, and that the complainant was affected by a physical disability or helplessness, mental incapacity or other inability. In addition, the Prosecutor-General says disclosure was provided to the applicant. In this regard confirmatory affidavits were filed by prosecutors who handled the case in the Regional Court.

[10] She asserts that the reason why a non-exhaustive list was enacted was to effectively combat the scourge of rape in our society. She avers that due to the pernicious nature of the crime, which is mostly perpetrated against women, by using sex as a weapon of domination and degradation, it is impossible to exhaustively list all the permutations of the crime in advance. She avers that a closed list of coercive circumstances will give rise to perpetrators evading punishment and that is the rationale for giving the court powers to determine, on a case by case basis, whether specific facts and circumstances amount to coercive circumstances in a given context. She therefore denies that coercive circumstances will be construed at the whim of anyone.

[11] The Prosecutor-General also denies any violation of the applicant's fair trial rights by virtue of the impugned provisions. She states that the applicant engages in speculation which is not founded on a proper application and reading of s 2(2) of CORA. She avers that a closed list would violate the right of a victim to seek or obtain redress and perpetrators would escape liability simply because that particular conduct is not included in the list. Such position, she states, is untenable in a constitutional democracy. She furthermore contends that the open-ended definition of coercive circumstances serves a legitimate objective and the means to achieve that objective and it does so without violating the rights of the applicant.

[12] She furthermore argues that the word ‘coercive’ and its meaning provide further clarity on the conduct that is proscribed. She denies that coercive circumstances can be fashioned by a prosecutor as the presence or absence thereof is a question of fact. She deposes that the determination of whether a specific act amounts to a crime or in this case amounts to a coercive circumstance has always been the preserve of the courts and there is nothing unconstitutional about that.

[13] Mr Phatela, who appeared for the applicant, submitted that the applicant is before court on the strength of the doctrine of vagueness which is premised on the notion that the law must be reasonably clear so that people may know how to regulate their conduct. In looking at s 2(2) of the CORA, he argued, it provides a bouquet of conduct that should be incorporated as coercive circumstances but the phrase ‘is not limited to’ leaves room for expansion of the scope of coercive circumstances. He says that it made the law limitless and anything else can be included. According to counsel, the impugned provisions are so unclear that it is difficult for people to understand what is expected of them and how to regulate their behavior accordingly.

[14] He argued that Parliament should have specified all the coercive circumstances so that the citizens and the courts will know what the law prohibits. It was contended that the legislature essentially abdicated its function to create law for the courts to measure the conduct of accused persons before them. It resulted in a type of unfettered discretion and flexibility which violates the doctrine of vagueness and amounts to a standard-less sweep that could result in severe terms of imprisonment if a person is convicted.

[15] It was also argued that s 2(2)*(c)* of CORA presents the same difficulty. This provision pertains to threats other than bodily harm in circumstances where it is not reasonable for the complainant to disregard the threats. Counsel submitted that this form of threat of non-physical violence is superfluous and goes further than is necessary. He gave an example of what he considers a threat contemplated in s 2(2)*(c)* namely the situation of a married couple wherein the wife is the sole breadwinner and

the husband forages for other opportunities outside the family life. The wife then tells the husband that unless he behaves and restores all conjugal rights she is going to evict him. The husband then submits to these threats. For him the net is cast too wide as it catches any type of human behavior. He proposes that this type of harm that is not bodily harm, invokes a question as to what type of relationship would underlie a provision such as this. He argued that Parliament should have been clearer in specifying the relationship or interrelationship especially of 'a person other than the complainant'. He concluded that though the notice of motion had several prayers, the essence of the application concerns the four words 'is not limited to' in s 2(2) of the CORA.

[16] Mr Nixon argued for the respondent. Based on the respondent's heads of argument, the application was opposed on two grounds. Firstly, the complaint by the applicant did not engage the validity of s 2(2) of CORA but that it is one of procedural law and secondly, the procedural law contains safeguards. Mr Nixon submitted that the oral argument by the applicant's counsel shifted from what was contained in the applicant's papers. In the papers, the case was that the prosecution or court will at the end of the trial construe coercive circumstances and the applicant may end up being convicted of coercive circumstances not contained in the charges, which is different from the oral argument that the law was vague as people would not know beforehand what conduct may be proscribed.

[17] The import of his argument was that there cannot be a legitimate claim of vagueness or overbreadth nor are the provisions unclear or superfluous. He argued that the meaning of the word 'coercive' implies using force or threats to make somebody do something against his or her will and connotes the absence of free will. Therefore, just by considering the allegations in the charge sheet a person will know what is referred to. In the case of the applicant, the charges were provided which set out the specific allegations of the sexual conduct as well as the specific forms of coercive circumstances in both the rape charges. In addition, he argued that the meaning and context of the relevant words must be considered.

[18] He referred to the rationale for the rape legislation, being to deal with the scourge of rape and the difficulty that a sealed list of coercive situations would bring about. He submitted that the legislature wanted to give that phrase a broad definition in order to catch all the perverse circumstances. He also delved into the shortcomings of the common law definition of rape and the fundamental shift that the CORA introduced to the prosecution of sexual offences. Even in the case of s 2(2)*(c)* of CORA, he argued, it was to cover all the situations wherein a complainant may find him or herself and because of the uneven power relationship between the complainant and the perpetrator such complainant does not have any reasonable option except to submit to the sexual act.

[19] Counsel also submitted that the procedural law has numerous and sufficient safeguards in relation to charges. He referred to s 84 and s 85 of the Criminal Procedure Act. These provisions can ensure that charges are sufficiently formulated, that amendments to charges do not prejudice an accused and other irregularities can be addressed. In conclusion, he prayed for the dismissal of the application with costs.

Law and analysis

[20] The applicant approached this court for relief as it has original jurisdiction to adjudicate matters that deal with the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder.[2] In order to succeed with the constitutional challenge, the onus is on the applicant to satisfy this court, on a balance of probabilities, that he is an aggrieved person as contemplated in Article 25(2) of the Constitution, that the rape charges proffered against him are vague, amounts to a violation of a fundamental right guaranteed by the Constitution, and that the impugned provisions do not serve a legitimate purpose and is therefore unconstitutional.

[2] Article 80(2) of the Namibian Constitution.

[21] Article 12 encompasses the fair trial rights that are enshrined in the Namibian Constitution. The specific provision on which the applicant relies is contained in Article 12(1)(*e*) of the Constitution. It provides that:

> 'All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.'

[22] The thrust of the applicant's constitutional challenges revolves around the concept of coercive circumstances which forms part of the definition of rape under the CORA. Section 2(2) reads as follows:

'For the purposes of subsection (1) "coercive circumstances" includes, but is not limited to

(a) the application of physical force to the complainant or to a person other than the complainant;

(b) threats (whether verbally or through conduct) of the application of physical force to the complainant or to a person other than the complainant;

(c) threats (whether verbally or through conduct) to cause harm (other than bodily harm) to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats;

(d) circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant;

(e) circumstances where the complainant is unlawfully detained;

(f) circumstances where the complainant is affected by –

(i) physical disability or helplessness, mental incapacity or other inability (whether permanent or temporary); or

(ii) intoxicating liquor or any drug or other substance which mentally incapacitates the complainant; or

(iii) sleep, to such an extent that the complainant is rendered incapable of understanding the nature of the sexual act or is deprived of the opportunity to communicate unwillingness to submit to or to commit the sexual act;

(g) circumstances where the complainant submits to or commits the sexual act by reason of having been induced (whether verbally or through conduct) by the perpetrator, or by some other person to the knowledge of the perpetrator, to believe that the perpetrator or the person with whom the sexual act is being committed, is some other person;

(h) circumstances where, as a result of the fraudulent misrepresentation of some fact by, or any fraudulent conduct on the part of, the perpetrator, or by or on the part of some other person to the knowledge or the perpetrator, the complainant is unaware that a sexual act is being committed with him or her;

(i) circumstances where the presence of more than one person is used to intimidate the complainant.'

The principle of vagueness

[23] The rule of law is one of the foundational values of the Namibian State and the principle of legality is a natural consequence of that. In the context of this matter, it denotes that the criminal law statute under scrutiny must contain an ascertainable standard of guilt so that it eradicates arbitrary arrests and convictions. The applicant essentially contends that because of the alleged vagueness of the words 'but is not limited to' the CORA offends against the principle of legality and violates his right to adequate preparation for trial, that the impugned provisions are overbroad, vague and do not serve a legitimate purpose.

[24] The doctrine of vagueness is not foreign to constitutional challenges in our jurisdiction. In *Lameck and Another v President of the Republic of Namibia and Others*[3], the court referred to the applicable principles which were summarized by Ngcobo J in

[3] *Lameck & another v President of the Republic of Namibia & others* 2012 (1) NR 255 at 279 para 89.

Affordable Medicines Trust and Others v Minister of Health & others [4] with reference to *R v Pretoria Timber CO (Pty) Ltd & another* as follows: [5]

'The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives and should not be used unduly to impede or prevent the furtherance of such objectives. As the Canadian Supreme Court observed after reviewing the case law of the European Court of Human Rights on the issue:

> "Indeed . . . laws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself."'

[25] Before dealing with the question whether the impugned provisions are vague and therefore unconstitutional, we find it necessary to briefly set out the legislative context in which CORA came into being. Previously, the offense of rape was prosecuted in terms of the common law and it was defined as the intentional and unlawful sexual intercourse by a man with a woman without the woman's consent. That traditional definition was problematic in many respects. Some of the anomalies were that in law a man could not be raped, forced oral and anal intercourse did not qualify as rape, and, most of all, that the whole trial mostly revolved around the element of consent. In effect what the latter regime

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[4] *Affordable Medicines Trust and Others v Minister of Health & others* 2006 (3) SA 247 (CC) para 108.
[5] *R v Pretoria Timber CO (Pty) Ltd & another* 1950 (3) SA 163 (A) at 176G.

did was to put the complainant 'on trial' as the State then had to prove beyond a reasonable doubt that the complainant did not consent to the sexual act.

[26] Apart from the need for legal reform, the country at the time also experienced an alarming rise in sexual violence cases of the most abhorrent manifestations of rape not only of women but of children and even infants. That gave rise to a public outcry for urgent action which culminated in a special debate in Parliament about the law pertaining to rape.[6] Against that background the CORA was promulgated as one of the most progressive rape laws and it came into operation on 15 June 2000. Not only does it contain a broader and gender-neutral definition of rape which covers a range of sexual acts committed under coercive circumstances, but it also relies on proof of coercion rather than absence of consent, which represents an enormous paradigm shift from the approach which often made the rape survivor feel as if she was the one on trial. It furthermore brought into operation stiff mandatory minimum sentences for rape; it provides greater protection against the sexual abuse of children; it acknowledges that rape can occur within marriage; it provides an opportunity for a complainant to inform a bail court of any threats, and it made inroads in the presentation of evidence in a rape trial in several respects.

Interpretation of statutory provisions under the Constitution.

[27] In determining the issues before us, this court is also called upon to properly construe the meaning of the impugned words. In that process the usual canons of statutory interpretation cannot be left out. The Supreme Court reminded us in *Kauesa v Minister of Home Affairs and others*[7] that the words should carry their ordinary meaning and content when construing a constitutional provision. However, that is not the only rule, as context also plays a role. In *Kambazembi Guest Farm CC T/A Waterberg Wilderness v Minister of Land Reform & 5 others*[8] it was said that statutory interpretation has as its

[6] See generally the Report on the law pertaining to Rape compiled by the Law Reform and Development Commission dated 1997/07/17.

[7] *Kauesa v Minister of Home Affairs and others* 1995 NR 175 (SC) at 184.

[8] *Kambazembi Guest Farm CC T/A Waterberg Wilderness v Minister of Land Reform & 5 others* (A 197/2015) [2016] NAHCMD 366 (17 November 2016) para 23.

object to construct the meaning of a text within the context of adjudication and that the meaning within which the adjudication process seeks to construct from a given text, must of necessity be performed within the context of the documents in which the text appear.

[28] Along with that, this court is alive to the founding values of the Namibian Constitution which is to permeate judicial interpretation. In *S v Cultura 2000 & another v Government of Republic of Namibia & others*[9], it was held that the Constitution must be*:*

> 'broadly, liberally and purposively interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it so continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its government.'

Section 2(2) of CORA

[29] With that in mind, we start by examining the effect of the impugned phrase in the legislation which reads as follows: 'For the purposes of subsection (1) "coercive circumstances" include, 'but is not limited to…'. The phrase 'including, but is not limited to' is mostly used in legal documents. Both counsel for the applicant as well as the respondent shared a common understanding of the function of the complete phrase, in that it causes an inclusive list to be broader to include aspects which were not stated. It expands the range in the list without having to specify each single item or aspect.

[30] The applicant contends that a part of the phrase namely, 'but is not limited to' is vague, redundant and should be severed. In considering that proposition, it has to be said that although the words 'including' and 'not limited to, sound similar in meaning, they are not exactly the same. Had the lawmakers used 'including' alone, this would have limited the coercive circumstances to what is stated as opposed to signify that it also includes other alike situations, even though they are not specified in that list. This understanding accords with this court's approach in *Visagie v State*[10] wherein it was said that by using

[9] *Visagie v State* 1993 NR328 (SC) at 340 B-D.
[10] (CA 67-2013)[2015] NAHCMD 216 (11 September 2015) para 25.

'includes, but is not limited to' the circumstances stated in that subsection requires that the phrase be given a broad definition.

[31] It is also necessary to consider the meaning of the concept 'coercive circumstances.' This has been dealt with in the *Visagie* matter. There the court construed the meaning of the word 'coercive' as using force or threats 'to make somebody do something against his or her will' and further held that the phrase 'coercive circumstances' connotes the absence of free will or consent. It corresponds with the meaning of the word 'coercion' which is explained in the *Merriam Webster's Dictionary of Law*[11] as the use of express or implied threats of violence or reprisal or other intimidating behavior that puts a person in immediate fear of the consequences in order to compel that person to act against his or her will.

[32] As far as the content of Article 12(1)*(e)* is concerned, it encompasses adequate time and facilities for the preparation and presentation of a defence before and during trial. The applicant's objection does not pertain to insufficient time, but rather that the open ended list of coercive circumstance violates his right to properly prepare for trial because he does not know what other coercive circumstances may be taken into consideration. Furthermore, as per the advice of the his legal practitioners, he is unable to receive proper legal advice as the legal practitioners are unable to account for the extent to which the State or the Court will stretch the definition and factors that pertain to coercive circumstances.

[33] The meaning of the word 'facilities' as contemplated in Article 12(1)(*e*) has been considered in *S v Nassar*[12], a matter that turned on an accused's right to have access to information in a police docket. In this matter, the court stated that the word 'facility' can mean 'facilitating or making easier the performance of an action' and the court also stated that one has to consider from a practical point of view what kind of information an accused needs in order to be put in a position to have a fair trial.

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[11] Mish et al *Merriam-Webster's Dictionary of Law* 2016 Merriam Webster Inc.
[12] *S v Nassar* 1995 (1) SACR 212 (NM).

[34] We return to the case at hand and consider whether the impugned phrase has deprived the applicant from being in a position to know the case he has to meet so that he can adequately prepare for trial and present his defence. In our adversarial system a criminal case cannot commence in a court unless a certain document is lodged, be it an indictment,[13] charge sheet,[14] a summons[15] or a written notice.[16] These documents respectively constitute the very basis of criminal proceedings in our courts and the State cannot create a case unless that procedure is adhered to. The procedural law also prescribes what has to be included in the formulation of a proper charge.[17] *In Mutschler v S*[18] the purpose of a charge was explained as follows:

> 'The charge against an accused person, whether presented in the form of a "charge sheet" or of an "indictment", is a vital step in the context of criminal proceedings. The charge contains the allegations of criminal conduct made by the Prosecutor General on behalf of the State against an accused person and presented for adjudication to a competent Court of Law. It forms the very basis of criminal proceedings against the accused. It not only serves to inform him or her but also the Court of the case which the Prosecution intends to prove...'

[35] Furthermore, arbitrary arrests and detentions are also an evil of the past and an accused cannot be arrested without being informed of the reasons for that arrest. Thus, the procedure to inform an accused of the reason(s) for his or her arrest, is now firmly entrenched in our law and the authorities cannot deviate from that as Article 11(2) provides that:

> 'No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.'

[36] As far as 'coercive circumstances' is concerned, we have already alluded to the fact that the word 'coercive' is steeped in connotations of intimidating behaviour in one or

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[13] Section 144 of the Criminal Procedure Act as amended.
[14] Section 76 of Criminal Procedure Act as amended.
[15] Section 54 of Criminal Procedure Act as amended.
[16] Section 56 of Criminal Procedure Act as amended.
[17] Section 84 of the Criminal Procedure Act as amended.
[18] *In Mutschler v S* Unreported judgment Case no CA 219/2005 delivered 2005.07.12

other form (by the perpetrator) and the absence of free will (on the part of the victim). In accordance with the requirements of a charge, the particulars of the coercive circumstances will have to be specified in the charge, which in turn serves to inform an accused what particular behaviour constitutes the 'coercive' circumstances. Along with that, it has to be remembered that 'coercive circumstances' alone do not constitute rape. Apart from the element of intention, the offence also requires the commission of a sexual act. Hence, once the meaning and context of the words in the charge is considered it will be intelligible. In these circumstances, it is questionable that an accused can claim to be in the dark as to the unlawful behaviour or that he or she will not know what is expected as a law abiding citizen.

[37] By extension, the claim by the applicant that he stands to be convicted at the whim of a prosecutor or a court falls for the same reason. The court will be guided by the facts of the case in its determination of whether it amounts to coercive circumstances. It is not the applicant's case that a new set of coercive circumstances was developed by the court. On the contrary, the application was launched in abstract, on a presumption of a set of facts that are not discernible from the record of the application. As such it would be academic to express an opinion on *S v BM* [19] relied upon in the applicant's heads of argument.

[38] In the matter at hand the Prosecutor-General deposed that indeed the applicant has been provided with the charges and disclosure of the evidence has been made. These averments were not denied by the applicant. Thus, the applicant has been informed of the particulars of the charges which include the specified alleged forms of coercive circumstances as well as the evidence in possession of the State. Armed with all that information, he has been placed in a position to properly prepare for trial and present a defence. In any event, had the applicant noticed anomalies in the charges or required further particulars, our criminal procedure also caters for that. It does not appear that he has pursued any of these avenues.

[19] *S v BM* 2013(4) NR 967.

[39] It is unmistakably clear that the legislature had in mind a broader definition as opposed to the insufficient common law definition of rape. The preamble of CORA starts by saying the purpose for the enactment is to 'provide for the combating of rape.' The offence of rape is one of the most serious offences, and, unfortunately, as the high incidence of rape cases in the country shows, very prevalent. Although the offence involves forced sex, it is not about love or sex, but rather an act of violence and aggression. It is deeply invasive and dehumanizing, often leaving the victims with physical injuries and enduring psychological trauma. More often than not, the victims are afraid to report it as they are shamed in the community and in their family circles. The trauma is worsened if the perpetrator is someone in a trusted position of power and/or an authority over the victim, which just perpetuates the cycle of secrecy, fear and shame. To add insult to injury, if the criminal justice system does not recognize the violation as rape, just because of some or other technicality, it leaves the perpetrator free to continue these acts as they are devoid of legal consequences.

[40] CORA must be seen as an expression of the trepidation suffered by the countless survivors of rape, who were unable to get justice, despite them finding the courage to report the incidents, simply because of the narrow definition. Had the definition not been extended, the sexual violence and exploitation of especially women and children would have continued unabated in this country. There are a wide variety of manipulative tactics that a perpetrator may utilize to intimidate and force a complainant into submission, which makes it impossible for the legislature to list each and every form of coercive circumstances. It is inconceivable for the legislature to enact all possible acts, experiences or situations that can occur under innumerable circumstances. Thus, the expansion of the list of coercive circumstances was necessary to catch the diverse permutations of fact wherein the offence can manifest.

Section 2(2)*(c)* of CORA

[41] The applicant also challenged s 2(2)*(c)* of CORA and deposed that he was advised that the provision is framed too wide, that it is vague as it does not provide who should

actually be the perpetrator of the threats; that he is worried that even lawful threats that are constitutionally protected could be used to convict him.

[42] In *Hendricks & others v Attorney General*, *Namibia & others*[20]which invalidated portions of the Combatting of Immoral Practices Act of 1980, the following was said on the issue of *locus standi* with reference to s 2(2) of that Act:

> 'Whether in a constitutional or common law context, the person seeking relief from the Court, bears the burden to prove his or her standing (see *Gross and Others v Pentz* 1996 (4) SA 617 (A) at 632D: "The general rule is 'that it is for the party instituting proceedings to allege and *prove* (my emphasis) that he has locus standi, the onus of establishing that issue rests on the applicant. It is an onus in the true sense; the overall onus…'. (*Mars Incorporated v Candy World (Pty Ltd* 1991 (1) SA 567(A) at 575H-I)"). The applicants have failed to do that insofar as they challenge the constitutionality of section 2(2) of the Act.'

[43] In the same matter it was pointed out that our Constitution does not expressly authorise standing to persons acting as a member of, or in the interest of, a group or class of persons or acting in the public interest, as the South African Constitution does. It is necessary to refer to the provision that deals with *locus standi* in respect of the application before court, namely Article 25(2):

> 'Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such right or freedom...'

[44] In considering the founding affidavit, we did not come across any averment that the applicant has been charged with rape committed under the coercive circumstances as defined in s 2(2)*(c)* of CORA. S 2(2)*(c)* of CORA deals with threats, other than bodily harm, to the complainant or to a person other than the complainant under circumstances where it is not reasonable for the complainant to disregard the threats. In looking at the two rape charges that the applicant stands to answer in the criminal case,

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[20] *Hendricks & Others v Attorney General*, *Namibia & others* 2002 NR 353 (HC) at 371E-G.

the particulars refer to certain specified forms of coercive circumstances, as referred to earlier and set out in the Prosecutor-General's affidavit. The applicant did not refute the allegations made therein. The bottom-line is that the applicant has not been charged with the provisions under s 2(2)*(c)* of CORA. To venture into the constitutionality of s 2(2)*(c)* of CORA would be a purely academic exercise as the applicant has not persuaded this court that he is aggrieved or a person under threat of a conviction under that provision.

Conclusion

[45] Courts interpret statutes by calling in aid the established canons of interpretation against the particular conduct or occurrence as the facts of a case may reveal. In that way, a court is able to apply the law to the particular facts of the case it is seized with, irrespective of the facts before court. The applicant is misplaced in the notion that coercive circumstances is construed at the whim of anyone. The courts, in the exercise of its powers and judicial discretion, adjudicate on the facts and the law to determine whether specific facts and circumstances constitute coercive circumstances in a given context.

[46] Returning to the impugned phrase in s 2(2) of CORA, it is formulated in such a way that it does not capture every possible perverse situation that can be used to intimidate and force a complainant into submission. It is designedly broad, but it was necessary to cover the wide extent of the coercive circumstances and alike situations. It serves a legitimate purpose of dealing with grave societal mischiefs, namely the scourge of rape cases and perpetrators that evade punishment under the cloak of the law. The position of rape under the common law definition was clearly unsustainable in our constitutional democracy founded on the rule of law and justice for all.

[47] In this matter, the first respondent has furnished rape charges to the applicant, inclusive of the particulars of the coercive circumstances. In addition, the first respondent has provided disclosure to the applicant. This was done in terms of the

existing criminal procedure, which, in our view, contains sufficient safeguards against vague or unspecified charges. That being the case, he was placed in a position to sufficiently prepare for trial and formulate a defence. The phrase 'but is not limited to' in s 2(2) has not impeded on the applicant's right to have adequate facilities for the preparation of his trial nor on his ability to present a defence. We therefore find that the phrase 'but is not limited to' in s 2(2) is not vague and the applicant knows what behavior he has to answer in the criminal trial.

[48] As far as s 2(2)*(c)* of CORA is concerned, it is our considered view that the applicant has failed to convince this court that he is aggrieved or under threat of a conviction under that provision as required by article 25(2) of the Constitution.

Costs

[49] On the issue of costs, Mr Phatela sought a costs order for instructing and instructed counsel in the event that the applicant is successful, but petitioned for no costs against the applicant in the event that the applicant is unsuccessful. Mr Marcus on the other hand argued that the challenge was contrived and he asked for a dismissal with costs. He submitted that there was no attempt to seriously engage the sections and the heads of argument was a mere repetition of the founding affidavit. Mr Marcus was not far off the mark in this regard. If we add to that the somewhat disjointed and repetitive allegations between the two impugned provisions, the late replying affidavit that was without a supporting affidavit, and the segment in the heads of argument that refers to challenges in respect of s 61 of the Criminal Procedure Act, which is totally unrelated to this matter, we are tempted to follow the general rule that costs follow the event.

[50] However that is not the only consideration when it comes to costs. The awarding of costs is a matter that falls entirely within the discretion of the court. It is trite that the discretion must be exercised judiciously whilst having regard to the particular

circumstances of each case.[21] In constitutional litigation the courts are cautious to penalize litigants who approach the court to enforce constitutional rights. This is because of the chilling effect that cost orders may have against a litigant that may seek to enforce a constitutional right. In light of that, this court will not mulct the applicant in costs.

[51] In the result the following order is made:

1. The application is dismissed.
2. There shall be no order as to costs.

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C CLAASEN

Judge

_____

N N SHIVUTE

Judge

_____

H JANUARY

Judge

[21] *Malachi v Cape Dance Academy International (Pty) Ltd* [2010] ZACC 24' 2010 (6) SA 1 (CC) 2011(3) BCLR 276 (CC) para 52.

APPEARANCES

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